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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

Conservatorship of the Estate of TYRONE MOSBY.	
TRACY TATE, Objector and Appellant, v. GOLDEN GATE REGIONAL CENTER, Petitioner and Respondent.	A126801 (Marin County Super. Ct. No. PRO 083480)

I. INTRODUCTION

Tracy Tate (Tate) filed a petition to be appointed conservator of the person and estate of her adult brother, Tyrone Mosby, who suffered a traumatic brain injury when he was a child. The Marin County Superior Court heard that petition along with two other competing petitions and filed its findings and order after hearing on June 2, 2009. Thereafter, on September 22, 2009, the court denied Tate's motion to set aside and vacate the judgment.

On October 23, 2009, Tate filed a notice of appeal pursuant to which she purported to appeal from the "Judgment after court trial," and specifically stated that the appealed judgment or orders were entered on August 17, 2009, and September 22, 2009. A copy of the notice of appeal that appears in the Clerk's Transcript contains an additional handwritten date of June 2, 2009.

Golden Gate Regional Center (GGRC) moves to dismiss this appeal, contending that (1) Tate's appeal from the June 2, 2009, order is not timely, and (2) the September 22, 2009, order denying the motion to vacate the judgment is not an appealable order.

We find that the appeal from the June 2, 2009, order is untimely and must be dismissed but that Tate may proceed with her appeal of the September 22, 2009, order denying her statutory motion to vacate the judgment.

II. DISCUSSION

A. *The appeal from the June 2, 2009, order is not timely*.

Rule 8.104(a) of the California Rules of Court[1] states: "Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served: [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment."

In the present case, the superior court clerk served a file-stamped copy of the June 2, 2009, order on Tate on June 3, 2009. Therefore, the last day for Tate to file a timely notice of appeal from that order was August 2, 2009, unless "a statute or rule 8.108 provides otherwise." (Rule 8.104(a).)

Rule 8.108(c) states: "If, within the time prescribed by rule 8.104 to appeal from the judgment any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first notice of intention to move—or motion—is filed; or [¶] (3) 180 days after entry of judgment."

[1] All further references to rules are to the California Rules of Court.

In the present case, Tate filed a Notice of Intention to Set Aside and Vacate Judgment and Enter Another Different Judgment on June 18, 2009. Because that notice was filed within the time prescribed by rule 8.104 to appeal from the June 2, 2009 order, the time to appeal that order was extended to the earliest of the three events outlined in rule 8.108(c).

Since the order denying Tate's motion to set aside and vacate was filed on September 22, 2009, the first potential deadline under rule 8.108(c)(1) was 30 days later on October 23, 2009. The second potential deadline, under rule 8.108(c)(2) was September 16, 2009, 90 days after Tate filed her June 18, 2009, notice of intention to set aside. Finally, if rule 8.108(c)(3) governed, the deadline for filing a notice of appeal was 180 days after the June 2, 2009 order, i.e., September 30, 2009.

The earliest of these three dates, which is the controlling date pursuant to the plain language of this rule, was September 16, 2009, 90 days after Tate filed her notice of intention to move to vacate the judgment. However, Tate filed her notice of appeal on October 23, 2009. Therefore, her appeal of the June 2, 2009 order is not timely.

Tate objects to the application of the 90-day deadline set forth in rule 8.108(c)(2), contending that it sets a "trap" and unfairly penalizes the litigant when a court fails to timely rule on a motion to vacate. She asks this court adopt a "liberal" interpretation of this rule and find that the 90-day deadline applies only in cases in which the court has timely ruled on the motion to vacate.

First, the language of this rule is neither ambiguous nor difficult to apply; we see no trap. Second, Tate provides no authority for her novel approach to calculating the deadline for appealing from a judgment or order. Finally, and in any event, "the filing of a timely notice of appeal is a jurisdictional prerequisite. 'Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.' [Citations.]" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.)

B. ***The September 22, 2009, Order is an appealable order.***

GGRC does not dispute that the appeal from the September 22, 2009, order is timely, but it nevertheless contends that Tate's entire appeal must be dismissed because the order denying Tate's motion to set aside or vacate is a non-appealable order.

"As a general rule, orders *denying* a motion to vacate are *not* appealable, because any assertions of error can be reviewed on appeal from the judgment itself. To hold otherwise would effectively authorize two appeals from the same decision. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:169, p. 2-93.)

"However, under a long line of cases, courts have created an exception to this rule of nonappealability for motions to vacate a judgment pursuant to section 663, termed a 'statutory motion.' [Citations.]" (*Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 301 (*Howard*).) "[D]espite early conflict in the decisions, it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable judgment or order, i.e., from denial of a motion made under C.C.P. 473, 473.5, or 663." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 200, pp. 275-278; see also, Eisenberg, et al., Cal. Practice Guide, *supra*, [¶] 2:171, p. 2-94.)

GGRC contends that, while "[s]ome older cases had argued that an appeal could be taken from the denial of a motion to vacate under section 663," the Supreme Court made a contrary "unambiguous holding" in *Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 871 (*Clemmer*), which this court is bound to follow.

Clemmer contains the following language: "Defendant appeals . . . from the orders of the trial court denying its motions (1) for judgment notwithstanding the verdict, (2) to set aside and vacate the judgment and enter a new and different judgment, and (3) for a new trial on all issues. Its appeal must be dismissed insofar as it purports to be from the latter two orders, such orders being nonappealable." (22 Cal.3d at p. 871.)

In *Howard, supra,* 206 Cal.App.3d at pages 301-302, Division Three of this court held that this language from *Clemmer* was dictum and followed, instead, the longstanding rule permitting a separate appeal from the statutory motion to vacate. This view of the

Howard court finds support in case law and commentary. For example, *Foreman v. Knapp Press* (1985) 173 Cal.App.3d 200, points out that the quoted language from *Clemmer* is "incongruous" in light of the fact that the Supreme Court expressly approved the rule of appealability of orders denying statutory motions to vacate in *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 663.

Witkin characterizes the *Clemmer* language as dicta, observing that the "procedural step had no significant effect, for the issues involved were fully reviewed on an appeal from the judgment and from an order granting a limited new trial." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 200, p. 277.) Eisenberg suggests that, because *Clemmer* "neither overruled nor, indeed, even mentioned the long line of precedent establishing the 'statutory motion exception,' [it] thus can be viewed as an 'anomaly' not affecting that precedent. [Citations.]" (Eisenberg, et al., Cal. Practice Guide, *supra*, [¶] 2:173, p. 2-95.)

GGRC essentially ignores this long line of authority and relies exclusively on *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813 (*Glair*). In *Glair*, the court dismissed an appeal from an order denying defendant's motion for JNOV. The court found, among other things, that construing the motion for JNOV as a statutory motion to vacate the judgment would not save the appeal. Citing *Clemmer*, *supra*, 22 Cal.3d 865, the *Glair* court held that the "denial of a motion to vacate the judgment and enter a different judgment is not separately appealable." (*Glair, supra*, 153 Cal.App.4th at p. 820.) The *Glair* court acknowledged that some courts have "questioned the significance of *Clemmer's* conclusion," and that the case had caused confusion. Ultimately, though, the *Glair* court was not persuaded that *Clemmer's* "express dismissal of the appeal from the section 663 motion to vacate the judgment should be disregarded as mere dictum." (*Glair* at pp. 821-822.)

We decline to follow *Glair* for several reasons. First, as noted above, that case is not directly on point since it involved an appeal from the denial of a motion for JNOV. We emphasize here that there is no dispute that Tate is appealing from a statutory motion to vacate the June 2, 2009, order. Second, we are persuaded by the *Howard* court's

reasoning and conclusion that the *Clemmer* language was dicta. Finally, we will follow the long-standing rule that orders denying statutory motions to vacate are separately appealable, a rule which is supported by the weight of authority, unless and until the issue is finally resolved by the Supreme Court.

C. *GGRC's Request For An Extension*

GGRC has requested an extension of 30 days after this motion is decided to file a respondent's brief. Absent objection from Tate, the extension request is hereby granted.

III. DISPOSITION

The motion by Golden Gate Regional Center to dismiss the appeal of Tracy Tate is granted as to the appeal from the June 2, 2009, order only. The motion to dismiss Tate's appeal from the September 22, 2009, order denying Tate's statutory motion to vacate the judgment is denied. The parties shall bear their own costs relating to this proceeding.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.